It follows that the appeal be dismissed with costs to the respondent. The deposit be paid to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Sri Ram Zukifly & Kumar; B.S. Sidhu & Co.*

YANG YAP FONG & ANOR. v. LEONG PEK HOON & ANOR.

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Syed Agil Barakbah S.C. JJ.) October 15, 1986 & January 10, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 222 of 1986]

Torts – Negligence – Road accident – Damages – Future loss of earning capacity – Evidence of likelihood to obtain employment and that injury will affect his earning capacity.

Damages – Future loss of earning capacity.

In this case the first appellant was injured when the motorcycle on which he was a pillion rider met with an accident with a motor car which was driven by the first respondent as the servant or agent of the second defendant. The first appellant was 13 years old at the time of the accident and the suit was filed by his father and next friend the second appellant. The respondents admitted full liability for the accident and the learned judge having heard evidence on the quantum of damages awarded in favour of the appellants the sum of $32,775.00 as general damages and $4,181.50 as special damages with interest and costs. The appellants appealed and on the appeal argued that the first appellant was entitled to an award for future loss of earning capacity in view of the serious injuries sustained by him. He sustained the following injuries:

1. Compound fracture of the right femur.
2. Fracture of the left clavicle.
3. Compound fracture of the right tibia and fibula resulting in 2 cm shortening to the right leg.
4. Supramalleolar fracture of the right ankle resulting in foot drop.

According to the medical expert evidence the changes in the right ankle joint will be likely to aggravate in the next 5 or 10 years. The learned judge held that the appellant was not entitled to any future loss of earning capacity, but he awarded out of a desire to assist him the sum of $1,800/– as loss of prospective earnings during hospitalization and recuperation and not as loss of future earnings or loss of earning capacity. He assessed the award at $200/– a month for a period of nine months.

Held, allowing the appeal: (1) the award of $1,800/– appeared to be pre-trial loss of earnings which the appellant was not entitled to claim being unemployed at the material time;

(2) the learned Judge erred in refusing to make any award for future loss of earning capacity. There was more than sufficient evidence of the likelihood that the appellant will be able to obtain employment and that in five or ten years the injury to his right ankle will aggravate with osteoarthritis setting in and increasing as he grows older and will thereby affect his earning capacity;

(3) the Court awarded him $12,000 for future loss of earning capacity based on a loss of income of about $100 a month for fourteen years;

(4) the award of $1800/– should be set aside.

Cases referred to:

(1) *Ngooi Ku Siong & Anor.* v. *Aidi Abdullah* [1985] 1 M.L.J. 30.

(2) *Moeliker* v. *A. Reyrolle Ltd.* [1977] 1 All E.R. 9.

(3) *Cook* v. *Consolidated Fisheries Ltd.* [1977] I.C.R. 635, 639.

(4) *Yang Salbiah & Anor.* v. *Jamil bin Harun* [1981] 1 M.L.J. 292.

SUPREME COURT.

Khoo Eng Chin (*A.C. Vohrah* with him) for the appellant.

S.K. Sivam for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the Judgment of the Court): This appeal relates to an accident claim for damages by the first appellant/plaintiff who was injured when the motorcycle on which he was a pillion rider and which was being ridden by one Hong Pau Kong met with accident with a motorcar which was driven by the first respondent as servant or agent of the second respondent. The first appellant was thirteen years old at the time of the accident and the suit was filed by his father and next friend, *i.e.* the second appellant. He was already an adult at date of the hearing.

In the Court below, the question of liability was not an issue since the respondents admitted full liability for the accident. The learned Judge having heard evidence on the quantum of damages, awarded in favour of the appellants the sum of $32,775.00 as general damages and $4,181.50 as special damages with interest and costs. The appellants were not satisfied with the award for general damages alleging that the amount was insufficient and manifestly inadequate. They appealed at first on four grounds, but abandoned the first three

which were concerned with the alleged inadequacy of the award for general damages, including no award for loss of amenities. They now say through counsel that the sum was reasonable and adequate. The only ground left was the fourth and last ground. The issue was whether the first appellant was entitled to an award for future loss of earning capacity in view of the serious injuries sustained by the first appellant. He was admitted to General Hospital Melaka on the same day of the accident, *i.e.* August 7, 1981. He sustained the following injuries:

(1) Compound fracture of the right femur.

(2) Fracture of the left clavicle.

(3) Compound fracture of the right tibia and fibula resulting in 2 cm shortening to the right leg.

(4) Supramalleolar fracture of the right ankle resulting in foot drop.

He remained in hospital for about three months for necessary treatment and was discharged on November 6, 1981. After discharge, he was examined several times by the Orthopaedic Surgeon of General Hospital Melaka, Dr. Thomas Verghese. His report on the patient dated September 23, 1982, relating to disabilities sustained was included in the agreed bundle of documents. (Pages 82 – 84 of the Appeal Record). Subsequently, the first appellant was examined by Professor N. Subramaniam of the Orthopaedic Surgery Unit, University of Malaya, on November 8, 1983. The learned Judge noted conflicting opinions in the two medical reports regarding the last item of the appellant's injuries. According to Dr. Varghese:-

"The right foot drop (paralysis of right foot) resulting from the lateral popliteal nerve injury has partially recovered now. He *should* recover full use of his right foot in time." (Page 84 para 7 of Appeal Record).

On the other hand, Professor Subramaniam, who testified as an expert witness for the appellant, wrote in his report:

"The changes in the right ankle joint are not gross at the moment but in the course of say, next 5 or 10 years it is likely to aggravate and be the cause of pain. It is also unlikely that he will ever regain complete movement in the ankle joint which means that he is going to have some difficulty in squatting and also a great deal of difficulty in playing field games."

In the course of his evidence, he made the following observations:

"Foot drop still persistent when I examined him this morning. This is due to injury to nerve on right leg. He may find it difficult to play ping pong. He will not be able to walk fast. Yes surgical scars are there. He is able to ambulate with a limping gait."

The learned Judge after taking note of the conflicting medical opinions took a middle course by reconciling the differing evidence "by assuming that the disability has been reduced but not completely healed." It was not clear at first whether the Judge was having his mind the question of loss of amenities. He went on however to refer to similar cases reported in *Dass* Quantum in Accident Claims, Volume 3, and finally awarded the appellant a sum of $12,000/– for drop foot and 2 cm shortening of the right leg. He based it "on the undisputable opinion in both reports regarding restriction of 5° dorsiflexion only in the appellant's right ankle." It is to be noted that the learned Judge did not reject Professor Subramaniam's opinion *in toto* in so far as the conflicting evidence is concerned although in the case of shortening of 2 cm. he preferred Dr. Verghese's opinion. He noted that the Professor was only making a prognosis or a forecast of what would likely happen to the appellant's ankle and foot drop in five to ten years' time. In fact, the Professor testified further that osteoarthritis would increase as the appellant grew older and then he would have pain and swelling in the ankle.

It should also be noted that in point of time the Professor examined the appellant more than a year after the examination by Dr. Varghese and he examined him again more than two years later on the morning before the proceeding commenced on January 29, 1986. On both occasions, the Professor found that the injury to the ankle had not healed. In the circumstances, we are of the view that the Professor's opinion is relevant in considering the principle applicable to future loss of earning capacity as decided in a number of cases. Had the learned Judge borne that in mind, he would have reached a different conclusion.

Earlier on his judgment, he held that the appellant had failed to prove any loss of earning capacity. He based his ground on the facts that prior to the accident the appellant was still schooling in Form I, returned to attend school thereafter but left after failing his Form III examination. At the time of the hearing, he was unemployed and residing with his parents in Singapore. His father intended to send the appellant to take a course in T.V. repair in which the appellant had shown some interest to be gainfully employed. It would take him between one to two years to qualify

and he would send him for the said course immediately after having the money. He was earning about $1,200/- salary as an electrician in Singapore. The learned Judge appeared to have accepted that the appellant would be able to earn $800/- per month as a T.V. mechanic "whether he was injured or not," and that the only reason why he was not earning that amount was because his father had no money to send him for the course. Although the learned Judge held that the appellant was not entitled to any future loss of earning capacity, he awarded "out of a desire to assist him" the sum of $1,800/- "as loss of prospective earnings during hospitalisation and recuperation and not as loss of future earnings or loss of earning capacity." He assessed the award at $200/- per month for a period of nine months. To us, the award appeared to be pretrial loss of earnings to which the appellant was not entitled to claim being unemployed at the material time. It was awarded under paragraph 5a of the amended statement of claim where the appellants pleaded "loss of earnings and/or earning capacity under particulars of special damages." The plea should be under general damages. In our opinion, no award could properly be made in the way the learned Judge had done.

The learned Judge did not give any reason for refusing to make any award for future loss of earning capacity although the record shows that the point was raised by counsel in their submissions. The probable ground appeared to be that the appellant who was nineteen at the date of hearing was not in any employment. But there was a prospect of getting one in the future soon after he qualified himself as a T.V. mechanic for which as stated earlier his father intended to send him as soon as he had sufficient funds. The principle applicable to future loss of earning capacity and its distinction with future loss of earnings are explicitly discussed in *Ngooi Ku Siong & Anor.* v. *Aidi Abdullah*[1] by the Federal Court. The proper test to be applied is whether some time in the future, due to the effect of the injuries sustained by him, the plaintiff will face a substantial risk of either losing his job or getting a less paid employment. It does not matter whether the plaintiff was in employment or not at the time of the trial so long as the Court is satisfied from evidence that there is a real or substantial risk that his earning capacity will be affected in the future. *Moeliker* v. *A. Reyrolle & Co. Ltd.*[2] and *Cook* v. *Consolidated Fisheries Ltd.*[3] are some of the cases in which a claim for loss of earning capacity was allowed to plaintiffs who were in employment and whose earnings were not affected at the material time.

However, in *Yang Salbiah & Anor.* v. *Jamil bin Harun,*[4] the plaintiff, a seven-year old girl whose injuries sustained from an accident due to the fault of the respondent bus driver, was awarded compensation by the Federal Court for loss of earning capacity. The Court held that despite her tender age there was not the slightest doubt that had she not been injured and rendered totally incapable of gainful employment, she would have at the appropriate age, earned an income for herself.

In the light of the above, we are satisfied that the learned Judge erred in refusing to make any award for future loss of earning capacity. There is more than sufficient evidence of the likelihood that the appellant will be able to obtain employment and that in five to ten years time the injury to his right ankle will aggravate with osteoarthritis setting in and increasing as he grows older and will thereby affect his earning capacity.

There is some difficulty in computing a proper award. However, we would adopt the sum of $200/- which the Judge had accepted as the appellant's lowest probable monthly earning. The appellant was nineteen at the date of trial and will be able to work till the age of fifty-five. His loss of earnings will likely commence in ten years time according to medical evidence, *i.e.* when he reaches the age of twenty-nine. Taking away one-third or twelve years for life exigencies and the like, there is a balance of fourteen years purchase in his favour. His probable loss of earning is about $100/- per month. The total loss of earning capacity for fourteen years will be $11,880/- according to the Annuity Table. We would award a round sum of $12,000/- for future loss of earning capacity. Although there is no appeal against the award of $1,800/-, for the reasons we have stated earlier this award should be set aside. There is to be no interest for this award of $12,000/-.

The appeal is therefore allowed with costs here and the Court below. Deposit to be returned to the appellant.

Appeal allowed.

Solicitors: *Vohrah & Tan Chee Lan; P.G. Lim & Co.*